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Supreme Court, U.S.
FILED

No. 93-195

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

GRANT R. BAKIN, M.D.,

Petitioner,

v.

COX ENTERPRISES, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Georgia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

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Respondent Cox Enterprises, Inc. respectfully submits this Opposition to

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1/ Petitioner has erroneously petitioned this Court for a writ of certiorari to the Supreme Court of the State of Georgia. Petitioner seeks review of the judgment of the Court of Appeals of Georgia.

the Petition for a Writ of Certiorari of Petitioner Grant R. Bakin, M.D.[2/]

JURISDICTION

Petitioner asserts that this Court's jurisdiction in the case exists under 28 U.S.C. § 1257(a) (1988). Pet. at 2. That section allows this Court to review state court judgments in three situations: "where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution . . . or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . ."

2/ A list of Respondent's subsidiaries, in compliance with Rule 29, is attached hereto as Exhibit A.

This case presents none of the three bases for jurisdiction prescribed by 28 U.S.C. § 1257(a). The ruling of the Court of Appeals of Georgia was based solely on its application of Georgia state libel law to the facts before it. Moreover, the Petitioner never raised any federal challenge to that court's interpretation of Georgia libel law either before the Court of Appeals of Georgia or before the Georgia Supreme Court. This Court therefore lacks jurisdiction to review the decision of the Court of Appeals of Georgia.

SUMMARY OF THE ARGUMENT

Petitioner challenges a judgment in which the Court of Appeals of Georgia found, as a matter of Georgia state law, that 31 articles published

by Respondent contained no harmful statements or hurtful innuendo of and concerning the Petitioner. Petitioner failed to raise any federal challenge to the ruling of the Court of Appeals of Georgia in any Georgia court. Because the Court of Appeals of Georgia did not rule on any issue of federal law, and because the Petitioner has not preserved any federal challenge to that court's interpretation of Georgia law, this Court must deny the Petition for Certiorari.

ARGUMENT

I. PETITIONER'S INDEPENDENT APPELLATE REVIEW ARGUMENT WAS NOT RAISED IN ANY PORTION OF THE STATE COURT PROCEEDINGS.

It is well settled that this Court will not hear arguments "not pressed or passed upon below." FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 217

(1990). See also Youakim v. Miller, 425 U.S. 231, 234 (1976) (per curiam); Clark v. Jeter, 486 U.S. 456, 459 (1988) (when reviewing state court decisions, the Supreme Court will not decide federal claims unless "pressed or passed upon" below). Because Petitioner failed to raise the applicability of the independent review doctrine in any court below, he is precluded from raising the issue in this Court.

The Rules of the Supreme Court of the United States further illustrate the shortcomings in Petitioner's arguments. Rule 14(h) mandates that when the Petitioner seeks review of a state court decision, he must provide specific references as to where, in both trial and appeals courts, the

federal issue was raised below, as well as how the courts passed upon it. Petitioner has not complied and cannot comply with this rule because the alleged federal issue brought before this Court was neither raised nor passed upon below.[3/] Under Supreme Court Rule 14.5 such noncompliance constitutes proper grounds for denial of this Petition.

3/ Furthermore, the independent appellate review doctrine as enunciated in Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984), applies only in "reviewing a determination of actual malice in a case governed by New York Times v. Sullivan." Bose, 466 U.S. at 514. The Georgia Court of Appeals did not rule on the issue of actual malice or on any other constitutional issue. Hence there would have been no basis for Petitioner's unusual independent appellate review argument even if it had been properly raised below.

II. THE COURT OF APPEALS OF GEORGIA BASED ITS RULING WHOLLY ON STATE LAW GROUNDS.

Petitioner cites three legal aspects of the Court of Appeals of Georgia decision with which he disagrees, and for which he seeks review. The rulings in question pertain to (1) the lack of references to Petitioner in 29 of the challenged articles, (2) the average reader's inability to infer the alleged implied defamations, and (3) the lack of any hurtful innuendo regarding Petitioner in the articles. Pet. at 9-10.

The first challenged aspect of the ruling below is based on the Georgia requirement that in order to be considered defamatory, an article must be "of and concerning" the plaintiff. See Ledger-Enquirer, Co. v. Brown, 214

Ga. 422, 423, 105 S.E.2d 229, 230 (1958) (In order to state a claim under Georgia libel law, "[t]he defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff.").

The second challenged aspect of the ruling below is based on the Georgia requirement that the presence of defamatory content must be evaluated from the point of view of the average reader. See Southern Business Mach. v. Norwest Fin. Leasing, Inc., 194 Ga. App. 253, 260, 390 S.E.2d 402, 408, (in determining whether a writing is libelous under Georgia law, courts consider the construction given by an average reader) (citations omitted), cert. denied, 194 Ga. App. 912 (1990).

The final aspect of the ruling of the Court of Appeals of Georgia challenged by Petitioner rests on the Georgia requirement that in order to be ruled defamatory, a statement must contain some hurtful innuendo relating to the plaintiff. See Armscorp of America, Inc. v. Daugherty, 191 Ga. App. 19, 20, 380 S.E.2d 729, 730 (1984) (Under Georgia libel law, "[i]f the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory.") (citation omitted).

The penultimate sentence of the opinion of the Court of Appeals of Georgia confirms that the sole basis for its ruling was that the challenged publications did not satisfy the Georgia criteria for a defamation

action. Pet. at 11a ("Therefore, because the 31 articles are not defamatory, the trial court erred in denying appellant's motion for summary judgment.") (emphasis added).

Because the ruling challenged by Petitioner is based wholly on Georgia state libel law, and because Petitioner failed to raise any federal challenge to that ruling below, this Court is bound to accept the ruling of the Court of Appeals of Georgia. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1972) (Supreme Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.") (citations omitted).

CONCLUSION

The Court of Appeals of Georgia based its ruling solely on state law grounds and Petitioner failed to raise any federal challenge to that ruling below. This Court thus lacks jurisdiction to review that judgment. Therefore, based upon the foregoing, Respondent Cox Enterprises, Inc. respectfully requests that Dr. Bakin's Petition for a Writ of Certiorari be denied.

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EXHIBIT A

Cox Enterprises, Inc., a Delaware corporation, is itself the ultimate parent company and all of its subsidiaries (except wholly-owned subsidiaries) are listed below (all of the below-listed corporations are indirect subsidiaries of Cox Enterprises, Inc. and except as otherwise noted, incorporated in the State of Delaware):

Manheim Auctions, Inc.
- Arizona Auction Services, Inc.
- Atlanta Auto Auction, Inc.
- California Auto Dealers Exchange, Inc.
- Colorado Auto Auction Services Corporation
- Florida Auto Auction Orlando, Inc.
- Fredericksburg Auto Auction, Inc.
- Fresno Auto Dealers Auction, Inc.
- Georgia Auction Services, Inc.
- Kansas City Auto Auction, Inc.
- Manheim Services Corporation
- Manheim Finance Canada, Inc.
- Manheim Auto Auctions Limited
- Manheim Auto Resale Services, Inc.
- Manheim Auctions Government Services, Inc.
- Manheim Investments, Inc.

Manheim's Metro Detroit Auto Auction, Inc.
Missouri Auction Services Corporation
National Auto Dealers Exchange, Inc.
New York Auto Auction Services, Inc.
New England Auto Auction, Inc.
New Manheim Auto Auctions Limited
North Carolina Services Corporation
Texas Auto Auction Services, Inc.
The Gold Book Inc. (a Georgia corporation)
Wisconsin Services Corporation
Cox Cable Cleveland Area, Inc.
Cox Cable Saginaw, Inc.
Cox Cable Quad Cities, Inc.
Cox Cable Spokane, Inc.